# THE ORIGIN AND DEVELOPMENT OF WRITTEN CONSTITUTIONS.

A CONSTITUTION is the fundamental law according to which the government of a state is organized, and agreeably to which the relations of individuals or moral persons to the community are determined. It may be a written instrument, — a precise text or series of texts, enacted at a given time by a sovereign power, — or it may be the more or less definite result of a series of legislative enactments, ordinances, judicial decisions, precedents and customs, of diverse origin and of unequal value and importance. Most existing free constitutions are of the first-mentioned type. To the second class belongs the English constitution — the one from which all others are in some degree descended. As the private law of the United Kingdom is not embodied in a code, so the rules of its government are not written. A Parliamentary vote, a decision of a court, may result in an extension or in a curtailment of these rules. The British constitution is a barrier which yields under the pressure of circumstances as often as that pressure reaches a certain degree of intensity, but a barrier which never breaks, being steady and firm despite, or rather on account of, its flexibility. Such a system, in which custom and tradition compete with legislation and not infrequently take the precedence, is eminently favorable to a mixed form of government. It is the one which circumstances produced in ancient Rome and which Cicero admired so much. In modern Europe the old régime knew no other. But since the end of the last century it has been superseded in most civilized countries. The democracy of modern times gave birth to written constitutions; and such has been the fortune of the new system thus inaugurated, that during this century almost all the states that gave up absolutism have been led to adopt it.

The design of the present article is not to compare what may be called the old and the modern forms of constitution, pointing

out defects and advantages, but simply to show, from the historical point of view, how the written form was selected and developed first in America, then in France and finally in the rest of continental Europe.

## I.

The men who are to be remembered as the founders of the modern system of written constitutions are the Puritans of the seventeenth century in England and in America. This has been proved by recent studies, published almost simultaneously in the POLITICAL SCIENCE QUARTERLY and in the Paris *Annales de l'École Libre des Sciences Politiques.*[1] The Agreement of the People, drawn up by Cromwell's soldiers (1647), the Instrument of Government of the Protectorate (1653), and farther back, before the Puritan revolution, the Fundamental Orders of Connecticut (1639), together with the well-known Plantation Covenants, subscribed by the early non-conformists as they settled on American soil, are the documents to which may be traced the origin of written constitutions. How the Independents based both religious and political society on an original compact, need not be insisted upon here. It has been fully discussed in the monographs above referred to, and later in a very interesting contribution to this magazine by Mr. D. G. Ritchie.[2] During the eighteenth century the ideas of natural right and compact received a new impulse. Locke, who imbibed from his Puritan masters the principles of Independency, first at the school of Westminster, then as a student at Oxford, had developed the theory of social contract in his *Essay on Civil Government.* It was soon to become one of the favorite subjects of philosophical dissertation. The New England clergy could draw it easily from the writings of the

[1] See Professor H. L. Osgood, The Political Ideas of the Puritans, POLITICAL SCIENCE QUARTERLY, VI, 1, 201 (March and June, 1891); Charles Borgeaud, Premiers Programmes de la Démocratie Moderne en Angleterre, 1647–1649, and Premieres Constitutions de la Démocratie Américaine, *Annales* of April 15, 1890, and January 15, 1891.

[2] The Social Contract Theory, POLITICAL SCIENCE QUARTERLY, VI, 656 (December, 1891).

fathers of congregationalism, John Cotton, Thomas Hooker, Richard Mather. They also began to systematize and comment upon the origins of government. As far back as 1710 and 1717, John Wise, pastor of a church in Ipswich, Massachusetts, published his then celebrated tracts: *The Churches Quarrel Espoused* and *A Vindication of the Government of New England Churches.* Ecclesiastical controversy had put the pen into the author's hand; but he could not help entering the field of political speculation. In the second of these treatises he expounded in the following manner his conception of the genesis of a state:

> Let us conceive in our mind a multitude of men, all naturally free and equal, going about voluntarily to erect themselves into a new commonwealth. Now their condition being such, to bring themselves into a political body they must needs enter into divers covenants.
>
> 1. They must interchangeably each man covenant to joyn in one lasting society, that they may be capable to concert the measures of their safety by a publick vote.
>
> 2. A vote or decree must then nextly pass to set up some particular species of government over them. And if they are joyned in their first compact upon absolute terms to stand to the decision of the first vote concerning the species of government, then all are bound by the majority to acquiesce in that particular form thereby settled, though their own private opinion incline them to some other model.
>
> 3. After a decree has specified the particular form of government, then there will be need of a new covenant, whereby those on whom sovereignty is conferred engage to take care of the common peace and welfare, and the subjects on the other hand, to yield them faithful obedience.[1]

John Wise's work was reprinted twice at Boston in 1772. More than once Congregationalist preachers gathered from it arguments and illustrations for their sermons, as political speakers and publicists took from Locke's writings the subject-matter of their addresses and pamphlets. On the eve of the great struggle for independence, the principle that all men

[1] A Vindication of the Government of New England Churches, drawn from Antiquity, the Light of Nature, Holy Scripture, its Noble Nature, and from the Dignity Divine Providence has put upon it (Boston, 1772), p. 30.

were equal under the law of nature, and that states were based, either historically or logically, on the social compact, filled the minds of the New England patriots. It was the fundamental dogma of their political creed. The Revolution caused it to spread through the other colonies. Non-conformists received it from the pulpit, Anglicans and Catholics from the tribune.

On the 20th of November, 1772, James Otis, the lawyer who, eleven years before, in his famous speech on the Writs of Assistance, had thrown down the gauntlet to the government of George III, and Samuel Adams, "the last of the Puritans," laid before the Boston town meeting in Faneuil Hall the first of the American Declarations of Rights. It began thus:

NATURAL RIGHTS OF THE COLONISTS AS MEN.

Among the natural rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the best manner they can. These are evident branches of, rather than deductions from, the duty of self-preservation, commonly called the first law of nature.

All men have a right to remain in a state of nature as long as they please; and in case of intolerable oppression, civil or religious, to leave the society they belong to and enter into another.

When men enter into society, it is by voluntary consent; and they have a right to demand and insist upon the performance of such conditions and previous limitations as form an equitable *original compact*.[1]

The men to whom, immediately before and after the Declaration of Independence, fell the task of organizing the emancipated colonies as free commonwealths, had their eyes fixed upon New England. Her representatives in the Congress at Philadelphia were eagerly listened to by all who had this duty to perform. The most influential of these advisers was John Adams, to whose exertions mainly was due the important resolution adopted by Congress May 10 and 15, 1776:

*Whereas*, his Britannic Majesty, in conjunction with the Lords and Commons of Great Britain, has, by a late act of Parliament, excluded the

[1] See Wells, The Life and Public Services of Samuel Adams (Boston, 1886), I, 502.

inhabitants of these united colonies from the protection of his crown . . . and it is necessary that the exercise of every kind of authority under the said crown should be totally suppressed and all the powers of government exerted under the authority of the people of the colonies . . . therefore,

*Resolved:* That it be recommended to the several Assemblies and Conventions of the united colonies, where no government sufficient to the exigencies of their affairs hath hitherto been established, to adopt such a form of government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular and America in general.

In this resolution the framing of written constitutions was not expressly called for, but such a course of action corresponded well to the views of both those who passed the resolution and those who were entrusted with its execution. Their conception of the state as founded on an explicit contract between individuals, the remembrance of the political covenants made by the early Puritan colonists, the example of the charters under which the government of several colonies had been framed, the necessity of legislating under the authority of the people — all concurred in bringing again to the front for further development the scheme which had already been thought out in both the old and the new country by the fathers of Anglo-Saxon democracy.

Even before the May resolve had been submitted for discussion, some commonwealths, upon their individual application to Congress for direction, had been advised to call representative assemblies "to establish such a form of government as would best promote the happiness of the people." From this resulted the provisional constitutions of New Hampshire (January, 1776) and South Carolina (March, 1776). The May resolve was the signal for more general action, and elaborate constitutions were soon framed in most of the colonies. On the 12th of June, the Virginian Assembly, at Williamsburg, adopted the famous Bill of Rights, which served more or less as the model for all others. A few days later, on the 28th, the constitution, which was to remain unaltered until 1830, was adopted. Like action was taken by New Jersey, July 2; Delaware, September 21; Penn-

sylvania, September 28; Maryland, November 8; and North Carolina, December 18. Rhode Island and Connecticut simply confirmed their ancient democratic charters, substituting for the name of the king that of the people. Georgia adopted her first constitution on February 5, 1777, and New York April 20, of the same year.

Massachusetts had to wait until 1780 before an end could be put to her provisional government. But her constitution was considered to be the most perfect expression of the American system as it was at the close of the Revolution. On the proposal of John Adams, who had drafted the plan, it was reported by a committee consisting of the two Adamses and President Bowdoin. The project was then discussed by a convention and submitted to the vote of the people. That remarkable instrument, which served as a pattern for the convention which in 1787 framed the federal constitution, and later for the assemblies which remodelled the original state constitutions, is still, after several revisions, the fundamental charter of the commonwealth of Massachusetts. It marks a starting-point in the history of modern public law, while the document itself shows a high degree of excellence. The preamble reminds us of a page of the *Contrat Social:*

> The end of the institution, maintenance and administration of government is to secure the existence of the body politic, to protect it and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government and to take measures necessary for their safety, prosperity and happiness.
>
> The body politic is formed by a voluntary association of individuals. It is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them: that every man may, at all times, find his security in them.
>
> We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the Great Legislator of the Universe, in

affording us, in the course of his providence, an opportunity, deliberately and peaceably, without fraud, violence or surprise, of entering into an original explicit and solemn compact with each other — and of forming a new constitution of civil government for ourselves and posterity: — and devoutly imploring his direction in so interesting a design, do agree upon, ordain and establish the following declaration of rights and frame of government, as the Constitution of the Commonwealth of Massachusetts.

One would imagine himself in this to be reading Jean Jacques. Yet it was not mainly from Rousseau, but farther back, from Wise and Locke, that the Massachusetts legislators gathered their inspiration. In this their confession of political faith may be found the real sense they gave to the famous theory of social contract.[1] The project of the committee, having been deliberated upon and adopted in the convention by a majority of votes, was submitted to the people in their town meetings and ratified also by a majority of the citizens. It was not, therefore, in spite of the letter of the text itself, a contract between individuals, but indeed a fundamental "law," enacted by the people and set by themselves at the foundation of their government, to be the supreme rule of the three powers which make, interpret and execute "the laws."

## II.

Immediately after the report of the committee of the Massachusetts constitutional convention had been issued, John Adams sailed for Europe. Sent for the second time on a mission to Louis XVI, he started on the 13th of November, 1779, taking

1 The thesis of the Genevan philosopher is usually refuted by saying that no state ever originated in contract — that society is for mankind the state of nature, as is the swarm in the case of bees. War is thus waged upon the "sophist" in the name of history and common sense. If instead of interpreting the much-disputed theory as if it related to the actual process of the formation of society, — an interpretation which does not necessarily follow from Rousseau's argument, — one takes it as a pure philosophical hypothesis, helping to explain the reciprocal position of independent members of a free state, no doubt it will be appreciated differently. This is most probably the meaning which the author of the *Contrat Social* intended to attach to it and, at any rate, this is the way the principal framers of the Massachusetts constitution understood it.

with him a printed copy of the project he had planned for his countrymen. Franklin, who had been in France since 1776 and had succeeded Voltaire to the first place in popular favor, was already occupying the minds of the philosophers with his own work, the constitution of Pennsylvania. John Adams's new scheme was soon to become also a subject of speculation. In 1783 Franklin published a French annotated edition of the constitutions of the thirteen states.[1] At once it was widely circulated, providing favorite themes for discussion everywhere, in the *salons*, in the clubs, at the court, in town, in the provinces. Enthusiasm for American liberty was carrying away Paris and the whole kingdom. Having supported the Congress with the power of her arms, France considered herself the godmother of the new republic. She was proud of her protégé; and as the principles proclaimed in the United States corresponded with the aspirations which the experience of the last reigns and the progress of philosophy were rousing within herself, she eagerly applauded the new political formulas. The English system of a liberty wrought out by the evolution of traditional law obtained some approval among the privileged classes. Upon this, however, the aristocracy was divided, and the most active among the young men joined La Fayette, Noailles, Lameth and their associates of the War of Independence, and were called "the Americans." Public opinion decided against England and the English system. In 1787 came the draft of the federal constitution, furnishing a new subject for discussion by philosophers and by the public in general. Frenchmen were already more jealous of public liberties than the Philadelphia convention. They were troubled because a declaration of the rights of man was not to be found in the project drawn up by that body.[2]

After this one naturally wonders that American ideas did not have a great influence over the compilers of the *cahiers* of 1789.

[1] Constitutions des Treize États-Unis d'Amérique. Philadelphie et Paris, 1783. Imprimerie de Philippe-Denys Pierres, Imprimeur Ordinaire du Roi.

[2] See the letters from La Fayette to Washington, dated January 1 and February 4, 1788.

The nobility and the clergy generally conceded that France was already in possession of a constitution, based on the existence of an hereditary monarchy and of the three orders. But the third estate, which was "nothing," and yet was soon to become "everything," almost unanimously demanded that the assembly which was about to meet should, before granting any tax, before transacting any business whatever, formulate a declaration of the rights of man and citizen and settle the basis of a written constitution. "A glorious revolution is impending," says the third estate of the Paris suburbs, expressing thus the general feeling; "the most powerful nation of Europe is going to bestow on herself a political constitution, that is to say, a steadfast existence in which abuses of authority will be impossible." A fundamental law enacted by the nation itself and aiming at the protection of the people against the abuses of authority: such is indeed the definition of a modern democratic constitution. Sieyès thought himself the inventor of it, but La Fayette protested on behalf of America against so unhistoric a pretension.[1]

It was in answer to the demand of the third estate that the Constituent Assembly framed the constitution which was assented to by the King September 14, 1791. The same end was aimed at in 1793 by Condorcet and his friends, the authors of the first project of a republican constitution, a mutilated copy of which was submitted by Robespierre to the votes of the people; and in 1795 (constitution of the year III), in 1799 (consular constitution) and afterwards, a like purpose was manifested, more or less sincerely, according to men and circumstances. In spite of the dictatorships, the idea which the representatives of the nation, when taking their oaths at the Tennis Court, swore to realize was the dominant idea of the French Revolution. The balance of powers experienced the quickest, the most extraordinary changes, individual rights were enlarged and restricted by turns, yet the principle of a fundamental written instrument, framed as the expression of the national will, remained the legal

[1] Mémoires, Correspondance et Manuscrits du Général La Fayette (Paris, 1837–38), IV, 36.

basis of every régime which issued from the movement of 1789. When the theories of the Revolution were spread over the continent, this principle sprang up everywhere under the feet of her victorious armies. In the Low Countries, in Italy, in Switzerland, constitutions were improvised on the ruins of the old social fabric. These were all similar to the one which the Convention had sent to the primary assemblies of the French people in 1795.

Napoleon destroyed alike pattern and imitations, but he paid his tribute to the principle. He ruled in pursuance of constitutions formally ratified by the people. The Emperor seemed to be all-powerful. For a time he forced the nations to march like armies under his leadership, deciding by his decrees the fate of provinces, as he would have disposed of regiments in battle array. Still the Revolution was superior to him.

> The greed, the excessive ambition of Napoleon himself and of the most influential of his ministers is subject to that power and will remain so in spite of themselves. It cannot be denied that, notwithstanding the iron despotism of his rule, he follows in many things of the first importance the principles of the Revolution before which, at least to save appearances, he is obliged to yield.

This is the evidence of a thoroughly credible witness. It may be found in the secret report on the reorganization of the Prussian monarchy, which Prince von Hardenberg drew up for his sovereign soon after the battle of Jena.[1] Though Napoleon treated the affairs of nations in the spirit of a general issuing orders in an enemy's country, yet he caused constitutions to be framed which have not been without an influence over the development of the states which were temporarily subjected to his sway.

It is well known that, during the Hundred Days, the *Acte Additionnel* which the former despot proposed to France was drafted by Benjamin Constant, one of the most liberal-minded political writers of that day, and one who enjoyed, with only a few reserves, the significant support of La Fayette. The *Acte Additionnel* superseded for a short time the charter most gra-

[1] Denkwürdigkeiten des Staatskanzlers Fürsten von Hardenberg, edited by Leopold von Ranke (Leipzig, 1877), V, 8.

ciously granted to his subjects by Louis XVIII, which bore the date "June 4, in the year of the Lord 1814, of our reign the nineteenth." After Waterloo and the second abdication of the Emperor, the King on his return from Ghent brought back the charter, and it continued in force until 1830. It was then remodelled by the authors of the July Revolution, and the King-elect, Louis Philippe, in presence of the Houses, solemnly swore to be loyal to it. In 1848, the constitution of the Second Republic was framed by a national assembly elected for that purpose by universal suffrage. The constitution of 1852, which consecrated the dictatorship of the Prince-President, was enacted by Louis Napoleon in pursuance of the extraordinary powers vested in him by the *plébiscite* of December 20 and 21, 1851. Such was the aim and spirit of that instrument, that the mere modification of a title made it the constitution of the Second Empire. It is well known that by a revision liberal institutions were grafted on this constitution by Napoleon III, only a few months previous to the war which was to overthrow it (1870). The present fundamental laws of the French Republic, the last of the eleven constitutions of France, were adopted by the National Assembly at Versailles, February 24 and 25 and July 16, 1875. They have twice been slightly amended, in 1879 and 1884.

## III.

When Napoleon was finally overthrown, the Revolution had extended through continental Europe, and even those who had fought most desperately against it had been compelled to borrow its arms in order to conquer. "Principles of democracy in a monarchical government," said Hardenberg, summing up the above-mentioned report, "such is the plan which appears to me most suitable to the spirit of the time." Stein realized that programme. Prussia, humiliated on the battle-field of Jena, resumed the energy of her life, maintained her independence and seven years after, at the head of the German states, led the way to victory.

The triumph of the Holy Alliance, a union formed in the name of legitimacy and divine right, was to be the signal of a reaction, which cannot rightly be called, however, a counter-revolution. At the Congress of Vienna, in the committee that laboriously worked out the German Confederation, the Prussian plenipotentiaries brought forward, as one of the conditions insisted upon by their government, the provision that the several states of the Confederation should have representative assemblies. Neither Hardenberg nor Stein believed in written constitutions. Each looked upon them as giving too great facilities for criticism, and as likely to encourage "metapolitical" speculations which lead too far.[1] Both statesmen preferred the English system. However, having to determine the conditions of existence for a new organism, they were compelled to draw up the plan of a federal compact. Their project was much too liberal for Austria and it was not adopted; but another was substituted for it, and the German Confederation received a constitution in thirteen articles. The last of these articles was worded thus: "In every state of the Confederation there shall be a constitutional assembly of estates."[2]

This did not explicitly provide for written state constitutions. Nevertheless, the German princes who had been more immediately under French influence thought at once of elaborating charters more or less like that which Louis XVIII had first granted to his subjects. Already, on the 2d of September, 1814, before the opening of the Congress of Vienna, the duchy of Nassau had received its own. This was the first of a series

[1] See a letter from Stein to Eichhorn of January 7, 1818, quoted by Seeley, Life and Times of Stein (London, 1870), III, 403.

[2] "In allen Bundesstaaten wird eine landständische Verfassung stattfinden." The words "landständische Verfassung" have been often translated, "representative constitution." Hence the Vienna Congress is credited by some authors with the establishment of constitutional government in Germany. This is a mistake. Indeed, the question was raised in the conferences of the German plenipotentiaries; but those who were adverse to any liberal solution knew how to turn to account the marked dislike of the smaller states for every provision which might seem to be an encroachment upon their particular rights of sovereignty, and the thirteenth article was deliberately left in equivocal terms. *Cf.* d'Angeberg, Le Congrès de Vienne, II, 1235, 1277, 1280.

of texts which played an important part in the development of new Germany. Under Napoleon's protectorate Westphalia, Bavaria, Saxe-Weimar, Frankfort and Anhalt-Köthen had received paper constitutions;[1] but owing to difficulties of every kind against which the rulers of these states had to contend during the stormy times of the *Rheinbund*, none had been fully put into operation.

Before he left for Vienna, in September, 1814, Count de Montgelas, minister of the king of Bavaria, called together a committee of revision. When Prussia made known her views respecting the internal organization of the states, that committee was directed to hasten its work. The monarchs of Würtemberg and Baden adopted similar measures and ordered charters to be drawn up.[2] The rulers of Schwarzburg-Rudolstadt, Schaumburg-Lippe, Waldeck and Saxe-Weimar soon followed the example and, meeting with less opposition among their subjects, were able to complete their work earlier than the princes of the south.[3]

In 1820 an article of the Final Act of the Congress of Vienna, completing the federal compact, went into force, empowering the Federal Diet, on the demand of the interested governments, to bestow its guarantee on the different state constitutions. This would have provoked a rapid multiplication of written charters, since they alone were susceptible of being effectually guaranteed, had not the Diet, after 1821, systematically declined requests of this character. We know, too, how Prussia suddenly abandoned the path of liberalism which she had been the first to enter, and became Metternich's most obedient follower. In consequence of this, the development of written constitutions within the Confederation was for a

[1] Westphalia, November 15, 1807; Bavaria, May 8, 1808; Saxe-Weimar, September 20, 1809; Frankfort, August 16, 1810; Anhalt-Köthen, December 28, 1810.

[2] Difficulties of execution hindered the promulgation of these three constitutions, in Bavaria and Baden till 1818, and in Würtemberg till 1819.

[3] Schwarzburg-Rudolstadt, January 8, 1816; Schaumburg-Lippe, January 15; Waldeck, April 19; Saxe-Weimar-Eisenach, May 5. To these charters may be added those of the principalities of Saxe-Hildburghausen, March 19, 1818, and Liechtenstein, November 9.

time checked. Hanover had received her charter December 7, 1819; Brunswick, April 25, 1820; Hesse, December 17 of the same year; Saxe-Coburg, August 8, 1821. Then follows a gap in the record until 1829, when a constitution was bestowed on Saxe-Meiningen. In 1831 those of Hesse-Darmstadt, Saxe-Altenburg and the kingdom of Saxony went into effect; in 1833, that of the principality of Hohenzollern-Sigmaringen; in 1836, that of Lippe-Detmold.

Now was to begin the great agitation which ended in the Frankfort Parliament, and in the generous but vain attempt to found a liberal empire under the ægis of the Prussian monarchy. From those days date the first constitution of the free town of Lübeck (1846), the constitutions of the duchies of Anhalt, those granted respectively by the king of Prussia (1848) and the emperor of Austria, those of Bremen, Oldenburg and the principality of Reuss-Schleiz (1849), and numerous revisions, or rather attempted revisions, of existing charters by conventions elected for the purpose.

The awakening of Germany from her dream of liberty and the repression which followed are familiar history. The development of political institutions suffered of course from the reaction. But the year 1848, which had witnessed an array of all the intellectual leaders of the German nation enthusiastically proclaiming her need of unity and progress, could not be erased from history. The influence of that great national movement on the future of Germany was greater than that of the reaction. Hamburg received her constitution in 1860. Finally in 1867, after the transformation of the old *Bund* into the North German Confederation, the principality of Reuss-Greiz obtained its charter. The compromise (*Ausgleich*) which now united the two halves of the Hapsburg monarchy into an empire also dates from 1867, and during the same year the constitution of the Cisleithan part was promulgated.

Nearly all the other countries of continental Europe have adopted in turn the system that France borrowed from America and transplanted into the old world. Besides the tiny states of Andorra, Monaco and San Marino, the only exceptions are

the Russian and Ottoman empires, which, from the point of view of political science, have not yet entered the era of modern civilization;[1] Montenegro, which is in nearly the same condition; Hungary and Croatia-Slavonia, which, within the limits of the compacts by which they are bound to each other and to the empire, have in their internal constitution maintained a system analogous to that of England; and finally, in the midst of the German empire, the duchies of Mecklenburg, which, in spite of general example and of the votes of the Imperial Diet, steadfastly maintain mediæval institutions.

The first constitution of Switzerland was that of 1798. The ancient *Bundesbrief*, which bound together the primitive *Waldstätten*, was dated five centuries earlier, and had been again and again renewed and extended to other cantons as they entered the league; but the compacts thus formed were rather international treaties than constitutions. Out of the old confederation of states the act of 1798 created a unified republic, on the pattern of the French. The experiment utterly failed. After five years of civil disturbance the Swiss welcomed the mediation of Bonaparte, the price of which was to be a standing contingent of 1600 men for his armies. According to the scheme of the First Consul each canton was restored to its original sovereignty and received a constitution embodying the outlines of its political organization. In 1814 the mediator's work fell to pieces, and in the following year articles of union, agreed upon by a Federal Diet at Zurich and subsequently approved by the Vienna Congress, took the place of the act of 1803. In this Compact of 1815 it was presupposed that the public law of the several cantons was, or would be, codified. The contracting parties mutually guaranteed their constitutions, and it was agreed that one copy of each should be deposited in the

[1] A part of the Russian empire, the grand-duchy of Finland, is to be mentioned as having a constitution. The country was Swedish until 1809, and when ceded to the Czar Alexander I by the Treaty of Freidrichschamm, was governed under charters granted in 1772 and 1789 by Gustavus III. The present constitution, which superseded the charters, was framed by the states-general of Finland and put in operation in 1864 by the Czar Alexander II as grand-duke.

federal archives.[1] This restored *Staatenbund* continued up to the civil war that gave birth to the *Bundesstaat* of 1848. The federal constitution then framed was remodelled in 1874, taking the form it has maintained to the present day. The new text was submitted to the Swiss people for approval or rejection, and was ratified by popular vote. Each state of course kept and developed its own cantonal constitution.

The modern fundamental law of Sweden dates from 1809. It was by no means the first of the kind that was established in the Scandinavian kingdom. As far back as 1634 an elaborate *Regeringsform*, drafted by Gustavus Adolphus and his chancellor Oxenstjerna, had been promulgated. This charter may be compared to Cromwell's Instrument of Government, and but for the premature death of Gustavus at Lützen, it might have proved of the greatest consequence, for it would probably have been proposed as a model to the allied North German princes. Unfortunately, at the time of its promulgation, Sweden had just lost her greatest king and with him the chances of leading in the formation of an empire. The subsequent codifications of public law of the Wasa monarchy are important only for their bearing on the internal history of Sweden. The constitution of 1809 was the product of the revolution which dethroned Gustavus IV. It was framed by

[1] The present boundaries of the Helvetic Confederation date from that epoch. Of the twenty-two commonwealths which then formed the Swiss *Bund*, one especially, the ancient republic of Geneva, may be said to have been in some respect conversant from the days of old with the system of written constitutions. Not long after the Reformation, in 1568, a *Code d' Édits*, declaring and settling the forms of the traditional government of the state, was proposed to the people and ratified by a vote of the citizens assembled in St. Peter's cathedral. Numerous revisions of it were made by the same process in the course of the following centuries. In 1794 a downright modern republican constitution was framed, and may be regarded as the first of this kind which went into operation in the old world. Formerly the public law of the city of Calvin made no essential distinction between political and civil edicts. It was little known abroad. But its "Codes" are, nevertheless, to be remembered, together with the "covenants" and "fundamental orders" of New England, as another instance of the results which Protestantism produced in the sphere of secular policy. The Bible to which the reformers appealed from the ecclesiastical tyranny of Rome was a written law. No wonder that wherever they had a civil power to establish they thought of setting over it a written statute as a safeguard against misgovernment.

the states-general and assented to by the Duke of Soedermanland, king-elect under the name of Charles XIII.

The constitution of Norway was established in 1814 by the convention that met at Eidsvold and proclaimed the country independent of Denmark. It was accepted the same year by the Swedish king, Charles XIII, when he took possession of the crown. We might cite a Danish *lex regia* of 1665. But this, being the result of a coalition of king, clergy and people against the ruling aristocracy, was only a mode of conferring absolute power upon the king. The modern constitution of Denmark is not older than 1849. Iceland received a special charter in 1874.

The *statuto fondamentale* of Italy is the same which was granted March 4, 1848, by Charles Albert to his subjects of Piedmont and Sardinia, and which was successively extended in 1859, 1860, 1866 and 1870 to the annexed parts of the kingdom. This statute had nineteen precedents in texts promulgated in the several parts of the peninsula after 1797, the year in which General Bonaparte founded the Cisalpine Republic.

From the era of the Batavian Republic dates the first constitution of the Netherlands. It was voted by the people in 1798 and, in consequence of events which had taken place in France, was revised in 1801 and 1805. King Louis Bonaparte issued his own constitution in 1806. Finally, in 1814, Prince William Frederic of Orange, on his return from exile, proposed to the assembly which met at Amsterdam and subsequently, after having received the crown, to the States-general of Holland and to the Belgian Assembly of Notables, the articles that still form the political foundation of the monarchy.[1] The grand-duchy of Luxemburg, the administration of which was transferred by the Vienna Congress to the house of Orange-Nassau, was ruled under the constitution of the Netherlands until 1841, when it received its own charter. In 1848 this gave place to a new constitution, which was thoroughly revised in 1856 and superseded by another in 1868.

[1] In Belgium the project was rejected by the Notables. It was nevertheless promulgated by the King, August 24, 1815.

Spain owes her first constitution to Joseph Bonaparte. Discussed *pro forma* and adopted in 1808 by an Assembly of Notables at Bayonne, it was superseded in 1812 by that of the National Cortes of Cadiz, which was accepted by Ferdinand VII, then repealed by himself (1823), and followed afterwards, according to circumstances, either by granted charters or by fundamental charters framed by constituent assemblies. The present constitution was framed in 1876 by the Cortes which Alphonso XII summoned after the Carlist insurrection had been brought to an end. The act drawn up in 1812 at Cadiz served as a model to the Cortes of Portugal, which was summoned by King Juan VI in 1820. The statute elaborated by this assembly was enacted in September, 1822. However, being too democratic to suit the wishes of the court, it was suppressed by the King as early as 1824. Juan's successor, Dom Pedro I, Emperor of Brazil and King of Portugal, when on the point of abdicating the second of his crowns in favor of his daughter, Doña Maria, granted in 1826 the constitutional charter which remains, after many vicissitudes, the fundamental statute of the realm.

If ancient monarchies, in which the traditions of public law had not been broken, felt the need of securing by written instruments the results of constitutional growth, new states which had sprung up in Europe under the influence of the same current of modern ideas, could scarcely avoid giving a precise formula to their political liberties. The first care of the national assembly which in 1822 proclaimed the independence of Greece, was to adopt the provisional statute of Epidauros.[1] Suspended by war and the numerous obstacles that hindered for years the realization of the Hellenic patriots' wishes, this statute was followed in 1827 by the constitution of Troezen and finally, in 1844, by the work of the assembly of Athens, which gave at last a firm constitutional basis to the government of King Otho.

[1] January 15, 1822. In 1821 three republican constitutions had been provisionally established in Greece, *viz.* the constitution of the West (Acarnania, Etolia, Epirus), adopted November 4, by the Missolonghi assembly; the Salona constitution, for the East (November 16); and the constitution of Peloponnesus (Argos, December 1).

This constitution was revised in 1864, after the election of George I. Belgium, after separating from Holland, gave herself the constitution of February 7, 1831, which is now for the first time in process of revision. The several provinces which have broken away from Turkey, with the exception of Montenegro, have followed the example of occidental countries. Rumania adopted a constitution in 1866, Servia in 1869,[1] Bulgaria in 1879.

## IV.

It needs hardly be said that the numerous texts which have been noticed are not all of one type. They may be classed in three groups: the charters granted by sovereigns to their subjects; the fundamental compacts agreed to by princes and representative assemblies; and the constitutions based on the principle of the sovereignty of the people.

The first of these types was the result of an attempt to satisfy in some measure what Hardenberg called the spirit of the time, without unduly encroaching upon the exclusive sovereignty of the reigning houses. But the old bottles were ill adapted to the new wine, and charters granted by the monarch have now become quite obsolete in the occidental world.

Unquestionably a more liberal expedient was the compact. It was an attempt to harmonize royal and parliamentary rights, though at the sacrifice of sound political doctrine. By this expedient sovereignty was divided into halves. It was to this device that many German princes resorted after the grants which they first thought of making, *motu proprio*, had been rejected by their emancipated subjects. This, more or less apparently, is the form under which most of the written monarchical constitutions of Europe have come into existence.

The constitutions of the third group are imperative acts of the nation itself. This type, which alone completely answers to the principles of the Revolution, is of course to be found in republican states, like the American Union, the French Republic and the Swiss Confederation. Among the existing

[1] Servia, whose autonomy dates from 1830, had a still-born charter in 1835.

monarchic constitutions, two or three have a certain connection with this class. The Greek *Syntagma*, framed by the constituent convention of 1864, can be revised without the co-operation of the king. The Norwegian constitution of 1814, at least according to the construction of the Christiania Storthings, and, in a sense, the Belgian constitution of 1831, are of the same character.

Of all the states that have now adopted written constitutions, none has ever permanently gone back to the former system. From the very nature of the new principle follows the steady continuance of its progress. A nation, having once had political institutions adequate to her wants precisely outlined in a fundamental law, can scarcely destroy that law without sooner or later substituting another in its place. We work our way out of the indefinite into the definite, not the reverse. It may then be safely predicted that the considerable extension of written constitutions which has taken place during this century will be lasting. If changes in practice are to be expected, it is in the countries that have not yet accepted the modern principle. But we have seen that in Europe these are comparatively few.

The South American republics and the numerous and powerful English colonies that now enjoy home rule cannot be considered in this article, already overburdened as it is with dates and condensed information. But the writer is fully aware that all these states have comprehensive fundamental statutes of government. Such general recognition of the rule that constitutional law should be explicitly enacted by the sovereign power in the state gives a peculiar importance to the history of its rise and progress. Not to write this history, but to suggest that it deserves to be written, and to show that the United States and France have led in the development of written constitutions, has been the object of this article.

CHARLES BORGEAUD.

GENEVA, SWITZERLAND,
August, 1892.